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IN THE

Supreme Court of the United States

October Term .....

In the Matter of Contempt Proceedings
in re MRS. OWEN JENISON

RESPONDENT'S OPPOSING BRIEF

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It appears to the undersigned that it will be helpful to the Supreme Court of the United States in considering the petition for a writ of certiorari to be directed to the Supreme Court of Minnesota that the facts which the Supreme Court of Minnesota had for consideration shall appear herein. Accordingly we set out the Statement of Facts from the Respondent's Brief filed with the Supreme Court of Minnesota in Case 38940, beginning on page 3.

STATEMENT OF FACTS

At the time that this is written, there is no settled case. Rule III of this court appears to contemplate a settled case. It may be that the court considers such rule to apply only on a review of proceedings before the Industrial Commission. If a settled case is required, it must follow that the burden of obtaining one must rest upon the relator.

The return on the writ is made by Judge Rolloff of the District Court of Renville County. These facts appear therein (see paragraphs 2, 3 and 4 of return):

"The November 1962 General Term of Court in Renville County opened on November 12, 1962. Among the jurors duly drawn and summoned for the term was Mrs. Owen Jenison, a resident of Preston Lake Township, Renville County, Minnesota. The jurors were summoned to appear on November 13, 1962, at 9 o'clock, a.m. The jurors reported, and the Court spent 45 minutes giving the jurors an orientation talk. In the orientation talk the Court read M.S. 628.49 relating to excuses from jury duty and invited anyone who felt they had just ground for excuse to confer with the Court at recess in Chambers immediately following the orientation talk.

"At such recess Mrs. Jenison came into Chambers and asked to be excused on the ground of her religious belief. This was the only ground asserted by her for an excuse from jury service. The Court advised her that she could not be excused on that ground. She stated she would not serve, and the Court advised her then that she would have to serve and that if she failed to do so she would be held in contempt of Court and punished.

"The first jury case called for trial on that day was the case of Lamberton Implement Company, Inc. v. Delbert Meyer, Renville County File No. 17765. Mr. Ramon Esparolini of the firm of Cochrane, Thomson & Bresnahan of St. Paul appeared as attorney for the plaintiff, and Joseph W. Parris of Olivia appeared as attorney for the defendant. A panel of eighteen jurors was duly drawn for that case by Glen Agre, Clerk of Court. Among the 18 called was Mrs. Owen Jenison. The Clerk administered the oath to the 18 jurors so called for voir dire examination. Counsel for the respective parties conducted a voir dire examination of all of said jurors. None of the 18 were challenged for cause.

Counsel for the respective parties then exercised their peremptory challenges. No peremptory challenge was exercised by either party as to Mrs. Owen Jenison. Just as the Clerk was about to administer the oath to the 12 jurors chosen, Mrs. Owen Jenison stood up in the jury box and made the statements which show in the transcript hereto attached."

The reporter's transcript of the proceedings is attached to the return as a part thereof. Therein appears the following:

"(At 9:45 a.m., Tuesday, November 13, 1962, following the orientation talk to the jury by the Court at the beginning of jury work for the November 1962 General Term of Court in Renville County, the case of Lamberton Implement Co., Inc. v. Delbert Meyer was called for trial, a panel of 18 drawn, voir dire examination conducted by counsel, there being no challenges for cause and peremptory challenges having been exercised, the Clerk was about to administer the oath to the jury as selected, and the following proceedings were had, Mrs. Owen Jenison being one of the 12 jurors chosen to serve on the case.)

"Mrs. Jenison: (Standing) Sir, I cannot serve on this jury. I cannot judge.

"The Court: The Court has told you that you must serve, and you will remain where you are and serve as a juror in this case.

"Mrs. Jenison: Well, I'll pronounce no judgment. I can't. It's against by Bible teaching. My Bible tells me, 'Judge not, so you will not be judged.'

"The Court: In view of your statements the Court holds you in contempt of Court. You will stay in the courtroom and the Court will deal with you summarily during recess time.

"You may step down and take a seat in the courtroom.

"Let the record show that because of this witness' refusal to serve on the jury the Court hereby finds that she is in contempt of Court. You may step down.

"(Thereupon Mrs. Jenison stepped down and proceedings were had to select one more juror to serve in the case.)

"(At 11:45 a.m., Mrs. Jenison and the Sheriff being present, proceedings were had as follows:)

"The Court: Mrs. Jenison, will you come forward in front of the Clerk's desk and be sworn. The Clerk will swear you.

"MRS. OWEN JENISON,

having first affirmed before the Clerk of the Court that she would make true answers to questions put to her, was examined and testified as follows:

"EXAMINATION

"By the Court:

"Q. Mrs. Jenison, so that the record may be clear, the Court understands that you refuse to serve as a juror because of some religious affiliation that you have. Is that correct?

"A. That is right.

"Q. And what church is it that you are connected with?

"A. Well, I'm a believer of the Bible, but we listen to the Radio Church of God.

"Q. Now, in 1948, in the May Term of Court you served as a juror in this court, in this county, did you not?

"A. I don't remember what year it was, but I have served. It's about 14 years ago; something like that.

"Q. And I was the presiding judge at that time, is that correct?

"A. I don't remember.

"Q. And at that time you made no protest about serving as a juror?

"A. That is right.

"Q. Have you since that time changed your religious belief?

"A. That is right.

"Q. According to the records you served in a case, or two cases which were consolidated, and you were paid for four days of jury service in May of 1948.

"A. Well, I was paid, but I don't know how many days.

"Q. Now, the Court has told you that the Court cannot excuse you. The law makes no provision for such an excuse, and the Court will ask you now once more whether you will now perform jury duty when called upon?

"A. I cannot.

"The Court: The Court finds and determines that Mrs. Owen Jenison is guilty of contempt of Court in refusing to serve as a juror and you may now step in front of the Clerk's desk and the Court will impose sentence.

"IT IS CONSIDERED AND ADJUDGED that as punishment for contempt of Court you be sentenced to the County Jail of Renville County for a period of thirty days.

"IT IS FURTHER ORDERED that you may purge yourself of contempt at any time during said period if you will indicate to the Sheriff that you wish to be relieved and are willing to do your civic duty. You are willing to accept all the benefits of citizenship and you refuse to perform even one single, tiny bit of citizenship responsibility so that you may enjoy the benefits of citizenship. Such conduct cannot be condoned.

"You are ordered placed in the custody of the Sheriff. That is all."

ARGUMENT

In 17 C.J.S., Contempt, p. 33, Sec. 25, we read:

> "Any act or conduct which shows disrespect for the dignity or authority of the court, or which obstructs or tends to obstruct, interrupt, prevent, or embarass the administration of justice, constitutes contempt of a criminal nature; and, when such act or conduct is committed in the presence of the court, or so near thereto as to interrupt its proceedings, it is a direct contempt, provided, also, it occurs while the court or the judge is engaged in the discharge of a judicial duty. * * *"

The judge is the master of the court. When the judge states the law, it is the law of the case which a juror may not question. In this case, the juror questioned the law and stated that she would not serve as a juror even though the judge advised her that she must serve and upon her failure to do so she would be held in contempt of court and punished. She had previously served as a juror at a former term of court. She was admonished by the court that she could not be excused on the ground of her religious belief and that was the only ground which she claimed as an excuse from jury service.

M.S.A. 628.49 had been read by the court to the jury panel. That section of the statutes expressly states that the court shall *not excuse* from service any person except upon the grounds therein stated. The excuse claimed by the relator is not among the grounds of exemption so stated. The court had the power in its discretion to excuse the juror, but she did not have the right to demand it. Clearly, it was no abuse of discretion for the court to refuse to exempt her from jury service.

Although relator was firm in her determination that she should "judge not", she was quick in asking that the court should adjudge that she was unjustly convicted for contempt. Such philosophy is unsound. Relator's obligations of citizenship are not subject to her will or whim.

50 C.J.S., Juries, p. 867, Sec. 143, declares that any person otherwise competent may serve as a juror no matter what his religious belief may be. And, if he is competent for the duty, the choice whether he shall serve is not his. It is for the court to decide.

Art. I, Secs. 6, 7, of the Minn. Const., cited in the petition for a writ of certiorari, are inapplicable to the facts under consideration.

Conley v. U.S., 59 F. 2d 929, held that the power to punish for contempt is inherent in all courts. It further held that judgment of contempt should not be disturbed except in case of clear miscarriage of justice. And it held that failure to appoint counsel for the accused was not error. The court said that these proceedings are "neither civil actions nor criminal prosecutions, as ordinarily understood", citing *Myers v. U. S.*, 264 U.S. 95, 44 S. Ct. 272, 68 L. ed. 577. The power may be likened to the inherent power of the court to discipline attorneys of the court.

THE QUESTIONS

The questions which the petitioner present are whether her conviction for contempt of court for refusing to serve on a jury violated her rights (1) under the First Amendment to the Constitution of the United States, and (2) whether petitioner's conviction of contempt without advising her of her right to counsel and without affording her adequate time to

prepare a defense, violated her rights under the Fourteenth Amendment. The Minnesota Supreme Court was of the opinion "that the duty imposed upon every citizen who is otherwise qualified to serve on a petit jury does not prohibit the free exercise of religion or interfere with her right to worship God according to conscience, and that refusal to serve is inconsistent with the peace and safety of the state." The court further states that "The Constitutional guaranty that every citizen may affiliate with whatever religious group teaches and practices doctrines which are consistent with his individual convictions, and that he may be governed by the dictates of his own conscience, is not an absolute unfettered privilege."

The cases which the Minnesota Supreme Court cite in support of its opinion well illustrate the underlying philosophy of the opinion and conclusion reached. Thus *Maricopa v. Corp*, 44 Ariz. 506, 507, 39 P. 2d 351, 352, compares the duty to serve as a juror to military duty in time of war. It is not for the citizen to say that he will not serve his country as a juror or as a soldier. The law decides and has decided.

The Minnesota Supreme Court cites *U. S. v. Hilliard*, 52 F. Supp. 612, which is a decision by the United States District Court for the Eastern District of Washington. In that case it was held that refusal of a Jehovah Witness to serve as a juror because of religious belief is justified by constitutional amendment prohibiting Congress from making any law prohibiting the free exercise of religion. To such last stated proposition the Minnesota Supreme Court did not subscribe.

We are impressed by the force of Judge Swellenbach's language in his opinion stating:

> "I must confess an utter inability to comprehend any relationship between defendant's professed religious beliefs and his distaste for jury service. I am unable to rec-

> oncile the Jehovah's Witnesses' abhorrence for human institutions with the alacrity with which they rush into the protecting arms of our courts whenever they become involved on controversy with our civil or military authorities. * * *"

We fail, as did also the Minnesota Supreme Court, to follow the logic of the author of that opinion in reaching his conclusion.

Braunfeld v. Brown, 366 U. S. 599, cited in petitioner's brief at page 6, states at page 601:

> "* * * Thus, the only question for consideration is whether the statute interfers with the free exercise of appellants' religion."

Appellants were members of the Orthodox Jewish faith, which requires the closing of their places of business and a total abstention from all manner of work from nightfall each Friday until nightfall each Saturday. They were in the clothing business and brought this suit to enjoin the enforcement of the Pennsylvania criminal statute which forbade the retail sale on Sunday of those commodities.

Chief Justice Warren at page 603 cites *Reynolds v. U. S.*, 98 U. S. 145, at p. 164, where he states that legislative power over mere opinion is forbidden but it may reach people's *actions* when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion.

The Chief Justice at page 605 cites Reynolds v. U. S., supra, which upheld the polygamy conviction of a member of the Mormon faith despite the fact that an accepted doctrine of his church then imposed upon its male members the *duty* to practice polygamy. He further cited Prince v. Massachusetts,

321 U. S. 168, where the Supreme Court upheld a statute making it a crime for a girl under eighteen years of age to sell any newspapers, periodicals or merchandise in public places despite the fact that a child of the Jehovah's Witnesses faith believed that it was her religious *duty* to perform this work.

On page 606 the Chief Justice said:

> "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. * * *"

On page 607 the Chief Justice states that if the state regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the state's secular goals, the statute is valid despite its indirect burden on religious observance unless the state may accomplish its purpose by means which do not impose such a burden. But the opinion of the Chief Justice sustained the validity of the Pennsylvania statute.

In *McGowan et al. v. Maryland*, 366 U. S. 420, at page 461, Mr. Justice Frankfurter said:

> "* * * However, this freedom does not and cannot furnish the adherents of religious creeds entire insulation from every civic obligation."

The Minnesota Court reached a sensible and logical conclusion that if the prospective juror is to be excused from service, such excuse must rest upon a rule of statute.

The statute, 628.43, specifies the grounds for exemption from jury duty. See petitioner's brief and petition, p. 3. It is exclusive.

We cannot and should not attempt to deprive a court of its discretion. To deprive a court of discretion is to make the judge a mere administrator.

Petitioner cites no authority to the effect that she was entitled to counsel upon consideration by the trial court whether a direct contempt was committed in the presence of the court and what the result thereof should be.

From her summary conviction of contempt she appealed to the Supreme Court of Minnesota, which court sustained the conviction in the trial court. It was held by the Supreme Court of Minnesota that the conviction should be sustained. So she has enjoyed due process of law.

Petitioner argues as though this were a criminal proceeding. It is not. It is a direct contempt committed in the conduct of a civil case. Procedure in a direct contempt and in a constructive contempt are different. That the present case was one for summary disposition requires no argument.

The entire proceeding may be summed up thus: Petitioner claims the benefits of citizenship free from its obligations. To such a claim the Minnesota Supreme Court did not subscribe.

That the pending petition for a Writ of Certiorari directed to the Supreme Court of Minnesota should not issue is

Respectfully submitted,

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